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No. 07-34

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DESIGNING HEALTH, INC.,

Petitioner,

v.

UDO ERASMUS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UDO ERASMUS

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This brief is submitted on behalf of Respondent Udo Erasmus ("Erasmus") in opposition to the Petition for Writ of Certiorari ("Petition") herein for the purposes of: (a) preserving Erasmus' objections to consideration of questions presented based on what occurred in the proceedings below, and (b) identifying misstatements appearing in the Petition, each as suggested by Supreme Court Rule 15.2.

In view of the two well-reasoned opinions (App. A and E at 1a and 21a) of the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), which establish the absence of any compelling reason for this Court to grant certiorari, we do not address that issue.

PETITIONERS WAIVED THEIR PRESENT CONTENTIONS

Petitioners failed timely to assert the contentions which they now seek to assert in the Petition.

On the 12th day of trial, October 22, 2002, all parties, including Petitioners, rested without reservation. (App. O at 219a-220a) Petitioners did not complain of outstanding evidence issues at the time the parties rested.

Shortly thereafter on the same day, the trial court issued its ruling (App. N, 130a-131a) which admitted certain exhibits offered by Petitioners and rejected others. Petitioners did not complain then, or at any time before, or even during, jury deliberations (which started after October 24 [see App. O at 220a-221a]), that any testimony had been foreclosed by the timing of the trial court's ruling.

Petitioners did not make that complaint in their first appeal (App. A at 5a). Indeed, Petitioners argued on that appeal that any delay in admitting documents was not shown to be "an abuse of the Court's discretion" (App. W at 337a; cf. Pet. p. 5). In its June 1, 2005 Decision (App. E at 21a et

seq.) on the first appeal, the Federal Circuit fully analyzed the evidence of damages, reversed the damages awards, reversed the trial court's denial of JMOL and issued no instructions (App. E at 23a-24a, 34a, 36a, 37a), thereby giving notice that the trial court lacked authority to act further respecting evidence of damages. *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1348 (Fed. Cir. 2001); *Engel Industries, Inc.* v. *Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999).

Petitioners motion for rehearing (App. G at 41a et seq.) neither complained of the timing of the trial court's evidentiary ruling nor indicated the existence of any evidence which the Federal Circuit had not already reviewed. Instead, Petitioners ambiguously sought "clarification * * * that the case is remanded for a new trial", but "at the district court's discretion * * * *" (App. G at 43a), which they argued was "not required" (App. G at 56a). The Federal Circuit declined the request (App. B at 14a-15a).

Petitioners then moved the trial court for new trial but did not rely upon, mention or follow F.R.Civ.P. Rule 59; the trial court properly denied the motion (App. C at 16a-18a), observing that:

> "Plaintiffs [Petitioners] failed to preserve their appellate record on the evidentiary issues they now seek to raise * * *." (App. C at 17a)

On a second appeal the Federal Circuit found that the "district court properly concluded that * * * it had no discretion to grant a new trial." (App. A at 2a-3a; see, Id at 9a-13a)

Having failed timely to assert the contentions which they now seek to assert here, Petitioners waived those contentions and may not seek that relief here.

PETITIONERS INVITED "JMOL ANALYSIS"

Petitioners' second question presented about "utiliz[ing] JMOL determination in a non-JMOL context", whatever that means, is seriously undercut by Petitioners' motion below for new trial, which is tacitly the subject of this Petition but was not included in Petitioner's appendix.

Following F.R.Civ.P. Rule 7, Petitioners' motion for new trial was specifically based first on F.R.Civ.P. Rule 50 which governs judgments as a matter of law after a jury verdict, and no other Federal Rule. Although Petitioners' motion also referred to a trial court's alleged "inherent power to order a new trial upon remand" and "a review of the Appellate Court's DECISION", the motion did not anywhere even mention F.R.Civ.P. Rule 59 which governs new trials generally.

By moving for new trial pursuant to F.R.Civ.P. Rule 50 Petitioners invited "JMOL analysis" from the courts below and Petitioners may not now complain that such analysis was followed.

MATERIAL MISREPRESENTATIONS APPEAR IN THE PETITION

Respondent disagrees with representations of fact made on the indicated pages of the Petition for the following reasons:

Pet. pp. 3-4: Petitioners did not proffer or produce "checks, sales registers, payments by DHI" underlying the summary charts which are discussed at Petition, pages 3-4 (App. N at 134a-141a, 161a-165a, 168a, 170a, 175a-178a) and which Petitioners displayed to the jury during closing argument. Indeed, for that reason the trial court originally deferred ruling on admissibility of Exhibits 15001 and 15002. (App. N at 207a, 211a) The trial record did not establish that plaintiffs [petitioners] ever provided to any

defendant the underlying documents to support these charts. (App. E at pp. 35a-36a)

Pet. pp. 8-9 Petitioners purport to state what the Federal Circuit "found" with respect to the award of fraud damages but omit from their description the following grounds stated by the Federal Circuit:

> (i) Petitioners' failure to satisfy California's requirement that damages be proved "with reasonable certainty" (App. E at 33a),
>
> (ii) The unavailability under California law of the "benefit of the bargain damages" awarded here (App. E at 33a), and
>
> (iii) "This evidence fails to establish the *profits*, if any, that DH derived from sales of the human products prior to entering into the distribution agreements" (App. E at 33a-34a).

In the Petition the foregoing items are redacted (without noting the redaction) from the paragraph of the Federal Circuit Opinion from which Petitioners extract what they assert to be the Federal Circuit's findings respecting fraud damages.

Pet. p. 15 Purporting to state the trial court's reasons for not exercising its discretion to consider Petitioners' motion for new trial, Petitioners quote from argument colloquy instead of the actual trial court opinion which discloses that the trial court predicated its decision in part on the following:

> "Plaintiffs [Petitioners] failed to preserve their appellate record on the evidentiary

> issues they now seek to raise, and it is not proper for this Court to review the orders entered in this case by the prior judge. * * * Finally, the failure of Plaintiffs to raise the evidentiary issues they now raise, after having had ample opportunity to do so, militates against discretion being exercised in their favor." (App. C at 17a-18a)

CONCLUSION

Petitioners failed timely to perfect their record below, invited the error now claimed and now misstate facts which are critical to their arguments for certiorari. Additionally, the absence of a compelling reason to grant certiorari is patent and stated in the two opinions of the Federal Circuit. That being the case, it is respectfully submitted that this Court should decline to consider the Petition.

Respectfully submitted,

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